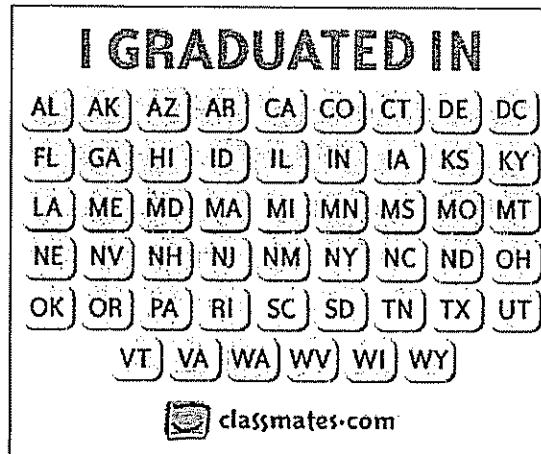


EXHIBIT D



Start: Minneapolis, MN 55402, US
End: Tomah, WI US



Directions

Distance

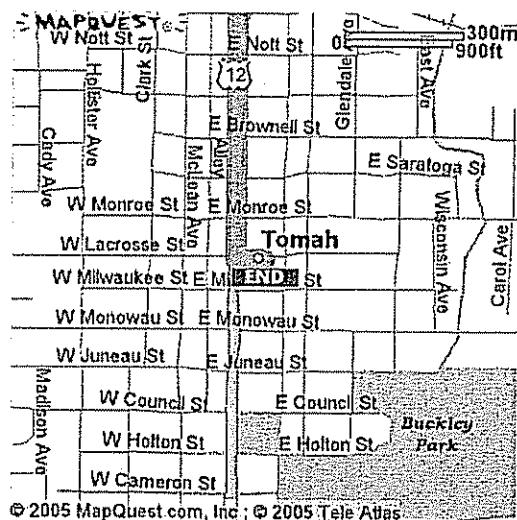
-
- 1:** Start out going NORTHEAST on MARQUETTE AVE toward S 7TH ST / MN-55 W / 7TH ST S. <0.1 miles
-
- 2:** Turn RIGHT onto S 6TH ST / 6TH ST S. 0.9 miles
-
- 3:** Merge onto I-94 E. 167.4 miles
-
- 4:** Take the US-12 exit- EXIT 143- toward WI-21 / TOMAH / NECEDAH. 0.2 miles
-
- 5:** Turn RIGHT onto N SUPERIOR AVE / US-12 E. 2.9 miles
-
- 6:** Turn LEFT onto E LACROSSE ST. <0.1 miles
-
- 7:** End at Tomah, WI US
-

Total Est. Time: 2 hours, 49 minutes **Total Est. Distance: 171.67 miles**



Start:
Minneapolis, MN 55402, US

End:
Tomah, WI US



Notes:

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EXHIBIT E

MAPQUEST

Start: 316 Robert St N
Saint Paul, MN 55101-1495, US

End: Alma, WI 54610, US

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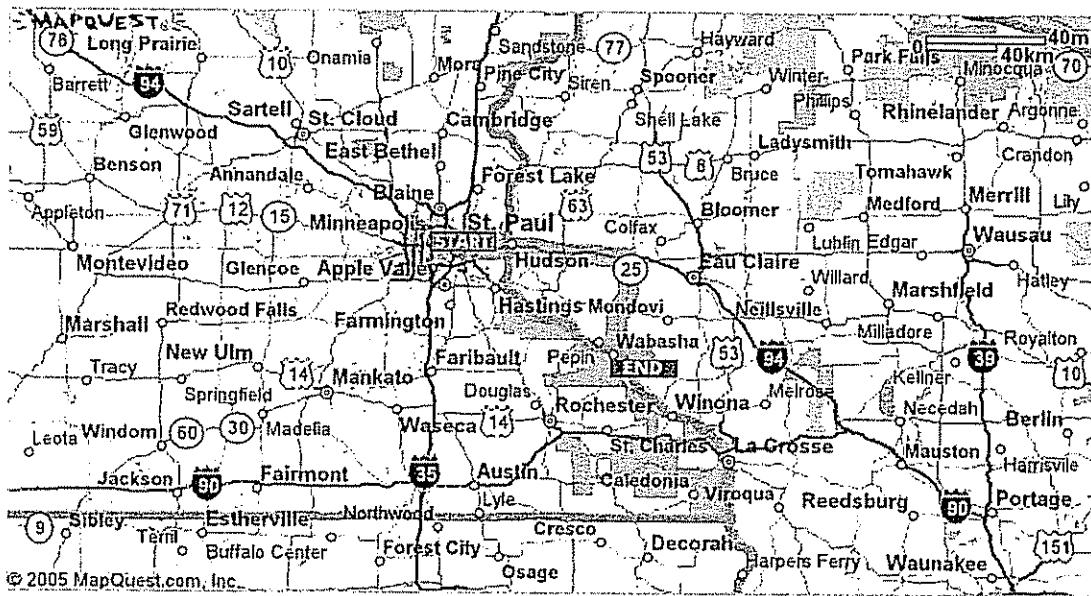
Directions

Distance

- | | | |
|--|---|------------|
| | 1: Start out going NORTHWEST on ROBERT ST N / MN-3 <0.1 miles toward 4TH ST E. | |
| | 2: Turn RIGHT onto 4TH ST E. | 0.3 miles |
| | 3: Turn LEFT onto BROADWAY ST. | 0.1 miles |
| | 4: Merge onto I-94 E. | 57.5 miles |
| | 5: Take the WI-25 exit- EXIT 41- toward MENOMINEE / BARRON. | 0.2 miles |
| | 6: Turn RIGHT onto N BROADWAY ST / WI-25. Continue 22.1 miles to follow WI-25. | |
| | 7: Turn RIGHT onto WI-25 / W PROSPECT ST. Continue 15.7 miles to follow WI-25. | |
| | 8: Turn LEFT onto S MAIN ST / WI-35. Continue to follow 6.6 miles WI-35. | |
| | 9: Turn LEFT onto WI-37. | 5.0 miles |
| | 10: Turn RIGHT onto MUD CREEK ST. | 1.8 miles |
| | 11: End at Alma, WI 54610, US | |

Total Est. Time: 2 hours, 11 minutes
miles

Total Est. Distance: 109.71

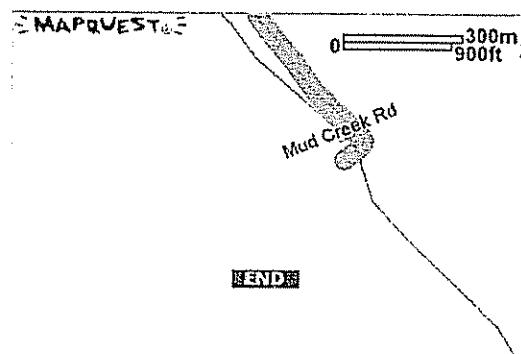


Start:

316 Robert St N
Saint Paul, MN 55101-1495, US

End:

Alma, WI 54610, US



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Notes:

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 Providence, RI 02903
 U S A
 Tel. (401) 421-2800

2004 Annual Report

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2004
Annual
Report.

Investors:

Douglas R. Wilburne
 Vice President, Investor Relations
 Tel (401) 457-2353
 Fax (401) 457-2220

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 Manager, Media Relations
 PR@textron.com
 Tel (401) 457-2362
 Fax (401) 457-3598

Banks and Rating Agencies:
 Mary F. Lovejoy
 Vice President and Treasurer
 mlovejoy@textron.com
 Tel (401) 457-3604
 Fax (401) 457-3533

Registered Shareholders:
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 Shareholder Services Group
 1525 West W T Harris Blvd . 3C3
 Charlotte, NC 28288
 U S A

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Tel (800) 829-8432
Fax (704) 590-7618

Textron Businesses

Bell

Bell Helicopter Textron Inc. [1]
P O Box 482
Fort Worth, TX 76101
U S A.
www.bellhelicopter.textron.com
(817) 280-2011

Textron Systems Corporation [2]
201 Lowell Street
Wilmington, MA 01887
U.S.A.
www.systems.textron.com
(978) 657-5111

Lycoming Engines [3]
652 Oliver Street
Williamsport, PA
U.S.A.
www.lycoming.textron.com
(570) 323-6181

Cessna

Cessna Aircraft Company [4]
One Cessna Blvd
Wichita, KS 67215
U.S.A.
www.cessna.com
(316) 517-6000
(800) 4CESSNA

Fastening Systems

Textron Fastening Systems Inc. [5]
840 W Long Lake Road
Suite 450
Troy, MI 48098
U.S.A.
www.textronfasteningsystems.com
(800) 544-6117

Industrial

Kautex Textron GmbH & Co. K.G. [6]
Kaulexstrasse 52
53229 Bonn
Germany
www.kautex.com
011-49-228-4880

Textron Fluid & Power Inc. [7]
40 Westminster Street

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Providence, RI 02903
 U S A.
www.maag.com
www.fhp.textron.com
www.textronpt.com
www.dbup.textron.com
 (401) 588-3400

Power Transmission
 Asia Pacific 61-2-4283-0300
 Europe 31-77-324-5900
 China 86-21-6235-0363
 Scandanavia 46-42-18-6820
 South Africa 27-11-748-0000
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Hydraulics
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 Europe 31-77-324-5900
 China 86-21-6235-0363
 Scandanavia 46-42-18-6820
 South Africa 27-11-748-0000
 UK 44-1202-627-500
 North America 1-704-295-7575

Greenlee Textron Inc. [8]
 4455 Boeing Drive
 Rockford, IL 61109
 U S A
www.greenlee.com
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 (800) 435-0786

E-Z-GO
 1451 Marvin Griffin Road
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Jacobsen [9]
 3800 Arco Corporate Drive
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 U.S A.
www.jacobsen.com
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Textron Financial Corporation [10]
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 Providence, RI 02903
 U S A.
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- [7] The Fluid and Power business unit consists of various legal entities, including but not limited to David Brown Union Pumps Company, Cone Drive Operations Inc., and Maag Pump Systems Textron Inc.
- [8] The Greenlee business unit consists of various legal entities, including but not limited to Greenlee Textron Inc. and Tempo Research Corporation.
- [9] The Jacobsen business unit consists of various legal entities, including the Jacobsen Division of Textron Inc., Ransomes Inc., Cushman Inc., and Steiner Turf Equipment Inc.
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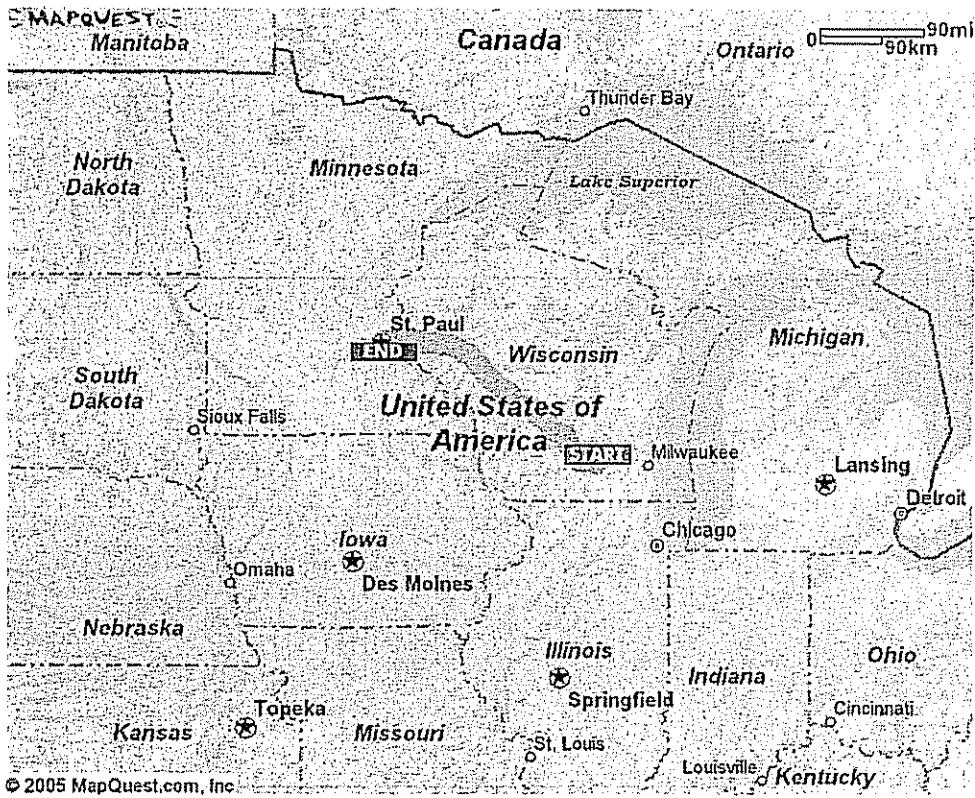
EXHIBIT G

Lake Mills, WI 53551, US

 316 Robert St N
Saint Paul, MN 55101-1495, US

Maneuvers	Distance
1: Start out going NORTHWEST on E WASHINGTON ST toward SCOTT ST.	0.1 miles
2: Turn RIGHT onto WI-89 / N MAIN ST / CR-G. Continue to follow WI-89 / CR-G.	0.7 miles
3: Merge onto I-94 W toward MADISON.	274.1 miles
4: Take the 6TH ST exit- EXIT 242D- on the LEFT toward US-52 S.	0.5 miles
5: Take the 6TH ST exit on the LEFT.	0.1 miles
6: Turn SLIGHT RIGHT onto 6TH ST E.	0.3 miles
7: Turn LEFT onto ROBERT ST N / MN-3.	0.1 miles
8: End at 316 Robert St N Saint Paul, MN 55101-1495, US	

Total Est. Time: 4 hours, 21 minutes**Total Est. Distance:** 276.28 miles



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EXHIBIT H



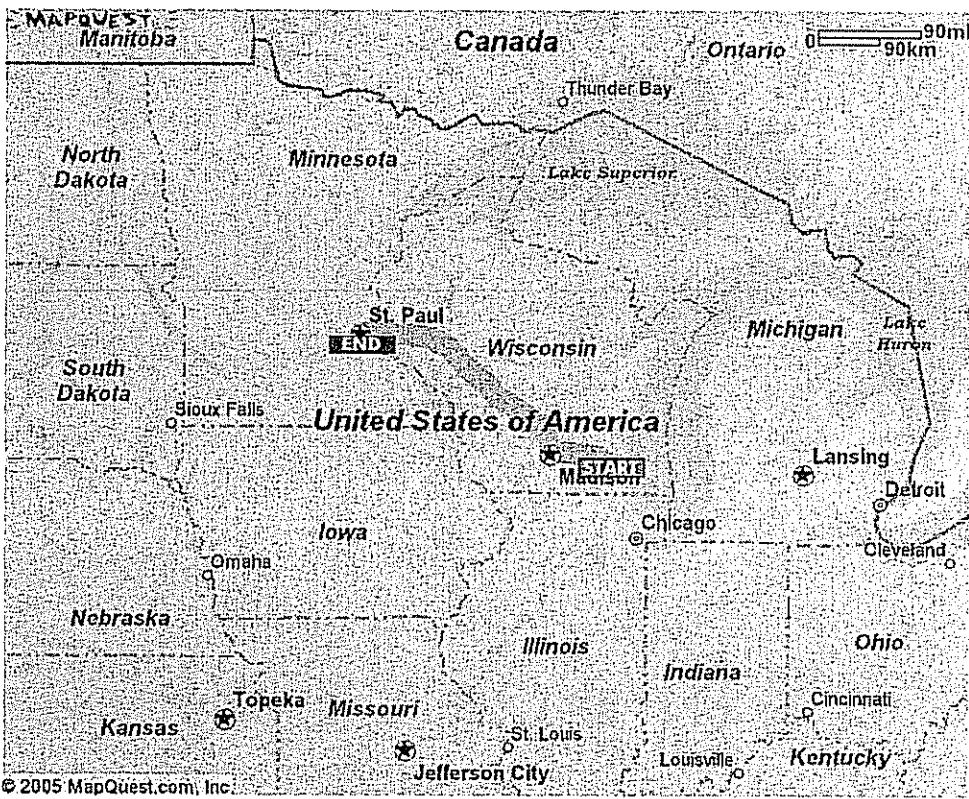
403 N Water St
Waterford, WI 53185-4021, US

316 Robert St N
Saint Paul, MN 55101-1495, US

Maneuvers	Distance
1: Start out going WEST on DANIELSON ST toward RED COAT CT.	0.1 miles
2: Turn LEFT onto FOX HORN DR.	<0.1 miles
3: Turn RIGHT onto RACINE ST.	<0.1 miles
4: Turn SLIGHT RIGHT onto WI-20 / WI-83 / W MAIN ST. Continue to follow WI-83 N.	17.1 miles
5: Turn RIGHT onto WI-83.	3.2 miles
6: Turn LEFT onto US-18 / SUMMIT AVE.	1.0 miles
7: Turn RIGHT onto CR-C / KETTLE MORaine DR. Continue to follow CR-C.	2.8 miles
8: Merge onto I-94 W via the ramp on the LEFT toward MADISON.	300.0 miles
9: Take the 6TH ST exit- EXIT 242D- on the LEFT toward US-52 S.	0.5 miles
10: Take the 6TH ST exit on the LEFT.	0.1 miles
11: Turn SLIGHT RIGHT onto 6TH ST E.	0.3 miles
12: Turn LEFT onto ROBERT ST N / MN-3.	0.1 miles
13: End at 316 Robert St N Saint Paul, MN 55101-1495, US	

Total Est. Time: 5 hours, 25 minutes

Total Est. Distance: 325.81 miles



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EXHIBIT I

2000 U.S. Dist. LEXIS 22222

BRUNSWICK CORPORATION, Plaintiff, v. PRECOR INCORPORATED., Defendant

C.A. No. 00-691-GMS

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

2000 U.S. Dist. LEXIS 22222

December 12, 2000, Decided
 December 12, 2000, Filed

DISPOSITION-1: [*1] Precor's motion to transfer granted.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff patent holder, a company incorporated in Delaware with a principal place of business in Illinois, brought an infringement action relating to exercise treadmills against defendant competitor, a company incorporated in Delaware with a principal place of business in Washington. The competitor moved to transfer the case pursuant to 28 U.S.C. § 1404(a).

OVERVIEW: The balance of the private factors tipped slightly in favor of transfer. The convenience of the parties, the convenience of the witnesses, and the location of records and books were the most pertinent of the private factors. Both parties were located outside of Delaware, the witnesses as well as the relevant documents and records were located in Washington, and the product at issue was designed and manufactured in Washington; therefore, the Western District of Washington was a more convenient forum for the litigation. Although the private factors tipped slightly in favor of the Western District of Washington, the relevant public factors weighed heavily in favor of transfer. There had already been litigation between the parties on another patent, a parent patent of the one at issue in the case, in the Western District of Washington. That matter was on appeal. Moreover, the parties were currently litigating another patent infringement matter involving exercise equipment in the Western District of Washington. Thus, transferring the case would have promoted the interests of justice.

OUTCOME: The court granted the motion to transfer venue.

CORE TERMS: patent, western district, convenience, patent infringement, weigh, balance of convenience, fora, tip, motion to transfer, choice of forum, infringement, expeditious, inexpensive, paramount, lawsuit, serving, principal place of business, manufacture, slightly

COUNSEL: For BRUNSWICK CORPORATION, plaintiff: Robert W. Whetzel, Richards, Layton & Finger, Wilmington, DE.

For PRECOR INCORPORATED, defendant: Samuel David Brickley, II, Connolly, Bove, Lodge & Hutz, Wilmington, DE.

JUDGES: Gregory M. Sleet, UNITED STATES DISTRICT JUDGE.

OPINIONBY: Gregory M. Sleet

OPINION: MEMORANDUM AND ORDER

On August 1, 2000, the plaintiff, Brunswick Corporation, and its division Life Fitness ("Life Fitness") brought this patent infringement action against Precor Incorporated ("Precor"). Life Fitness alleges that Precor is infringing its U.S. Patent No. 6,095,951 ("'951 patent") relating to exercise treadmills. Presently before this court is Precor's motion to transfer this case to the United States District Court for the Western District of Washington, pursuant to 28 U.S.C. § 1404(a). Because the court finds that a transfer would convenience the parties and the witnesses while serving the interests of justice, Precor's motion to transfer is granted.

I. BACKGROUND

A. The parties

Life Fitness and Precor both design, manufacture, [*2] and sell exercise equipment and both directly compete with one another in the exercise fitness market. Although both parties are incorporated in Delaware, neither party maintains a physical presence (e.g., offices or facilities) in this state. Life Fitness has its principal place of business in Franklin Park, Illinois and Precor has its principal place of business in Bothell, Washington.

B. Prior Litigation Between the Parties

2000 U.S. Dist. LEXIS 22222

"Life Fitness and Precor are no strangers to each other, nor to patent litigation." D.I. 7, at 2. In 1994, Precor filed a patent infringement suit against Life Fitness in the United States District Court for the Western District of Washington ("1994 litigation"). At issue in the 1994 litigation were U.S. Patent Nos. 5,599,259, 5,752,897 and certain Claims of U.S. Patent No. 5,382,207 (respectively the "259, '897, and '207 patents"). The '207 patent is the parent of the '951 patent currently at issue in the case before the court.

In the 1994 litigation, Claims 1-36 of '207 patent were dismissed on summary judgment in February 1996 leaving only claims 37, 38, and 39 at issue. In early September 1999, Life Fitness voluntarily stipulated to the dismissal [*3] of the claims for infringement of the '259 and '897 patents as well as Claims 38-39 of the '207 patent. As a result of this stipulation, these claims were dismissed with prejudice in an order dated September 23, 1999. See *Precor Inc. v. Life Fitness*, No. C94-1586C (W.D. Wash. Sept. 23, 1999) (stipulation and order of dismissal). Thus, the only infringement claim remaining for trial related to Claim 37 of the '207 patent. In October 1999, Life Fitness lost at trial as to this one patent claim. The judgment from the 1994 litigation is currently on appeal to the Federal Circuit.

II. DISCUSSION

Pursuant to 28 U.S.C. § 1404(a), the court may transfer this action to "any other district where it might have been brought" when it appears that a change of venue would "convenience" the parties and the witnesses while serving the "interest of justice." 28 U.S.C. § 1404(a) (1993). The parties here agree that Life Fitness could have brought this action in the Western District of Washington. See 28 U.S.C. § 1331(b)(1) (1993). Moreover, this lawsuit could have initially been filed in Washington because it is a patent [*4] infringement matter. See 28 U.S.C. § 1400(b). Therefore, the court will next apply the most relevant public and private factors to the facts of the case as directed by the Third Circuit's decision in *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879 (3d Cir. 1995).

In *Jumara*, the Third Circuit Court of Appeals identified a nonexclusive list of factors that have been used to guide courts in the exercise of their discretion in ruling on requests for transfer. 55 F.3d at 879-80; see also *Affymetrix, Inc. v. Synteni, Inc.*, 28 F. Supp.2d 192, 196-97 (D. Del. 1998). These factors fall into two groups: those relating to the private convenience of the litigants and those affecting the public interest in the fair and efficient administration of justice. *Jumara*, 55 F.3d at 879-80. n1 The court should apply these factors to determine, "on an individualized, case-by-case

basis, whether convenience and fairness considerations weigh in favor of transfer." Id. at 883 (citing *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 30-31, 101 L.Ed.2d 22, 108 S.Ct. 2239 (1988)). [*5] The burden is on moving party to show that balance of convenience and the interests of justice weighs in favor of transfer. See *Jumara*, at 879.

----- Footnotes -----

n1 The private interests may include: 1) the plaintiff's original forum preference; 2) the defendant's preference; 3) whether the claim arose elsewhere; 4) the convenience of the parties; 5) the convenience of the witnesses-- but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; and 6) the location of books and records (similarly limited to the extent that the files could not be produced in the alternative forum). *Jumara*, 55 F.3d at 879-880. The public interests may include: 1) the enforceability of the judgment; 2) practical considerations that make the trial easy, expeditious, or inexpensive; 3) the relative administrative difficulty in the two fora resulting from court congestion; 4) the local interest in deciding local controversies at home; 5) the public policies of the fora; and 6) the familiarity of the trial judge with the applicable state law in diversity cases. *Id.*

----- End Footnotes -----

[*6]

A. Private Factors

The court concludes that the balance of the private factors tips slightly in favor of transfer. In this case, the court finds the convenience of the parties, the convenience of the witnesses, and the location of records and books to be the most pertinent of the private factors. Although both parties are incorporated in Delaware, Precor maintains its headquarters in the Western District of Washington and Life Fitness in Franklin Park, Illinois. Additionally, neither of the parties, their witnesses, or any of the potentially relevant documents and records are located in Delaware.

Recognizing that the balance of convenience tips toward the Western District of Washington, Precor further argues that Life Fitness will suffer no greater inconvenience in traveling to Washington than

2000 U.S. Dist. LEXIS 22222

Delaware. In contrast, Life Fitness argues that its choice of forum is paramount. The court acknowledges that a plaintiff's choice of forum is a "paramount" consideration that is not to be "lightly disturbed." *Schutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3d Cir. 1970); see also *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879-80 (3d Cir. 1995). In this case, [*7] however, the plaintiff's preference for Delaware is not given as much deference because most of the events at issue, that is, the design and manufacture of the exercise equipment, occurred outside of Delaware. See *Biltamco Underwriters, Inc. v. Wallace*, 56 F. Supp. 2d 542, 545 (E.D. Pa. 1999). "The transfer of a case will generally be regarded as less inconvenient to a plaintiff if the plaintiff has not chosen . . . a forum where the alleged wrongful activity occurred." *Continental Casualty Co. v. American Home Assurance Co.*, 61 F. Supp. 2d 128, 131 (D. Del. 1999). Thus, because the parties are located outside of Delaware, the witnesses as well as the relevant documents and records are located in Washington, and the product at issue was designed and manufactured in Washington, the Western District of Washington is a more convenient forum for the litigation.

B Public Factors and the Interest of Justice

Although the private factors tip slightly in favor of the Western District of Washington, the relevant public factors weigh heavily in favor of transfer. Most relevant to the courts inquiry is whether there are practical considerations that would make [*8] trial "easy, expeditious, or inexpensive." *Jumara*, 55 F.3d at 879. In this case, there has already been litigation on the '207 patent, a parent patent of the one at issue here, in the Western District of Washington. This matter is on appeal. Moreover, the parties are currently litigating another patent infringement matter involving exercise equipment in the Western District of Washington. n2 Where related lawsuits exist, "it is in the interests of justice to permit suits involving the same parties and issues to proceed before one court" See *Liggett Group, Inc. v. R.J. Reynolds Tobacco Co.*, 102 F. Supp. 2d 518, (D.N.J. 2000) (citations omitted). Thus, the court finds that transferring this case would promote the interests of justice

Finding that the balance of convenience and the interests of justice weigh in favor of transfer,

IT IS HEREBY ORDERED that:

1. Precor Incorporated's [*9] Motion to Transfer is GRANTED; and
2. This matter shall be TRANSFERRED to the Western District of Washington.

Date: December 12, 2000

Gregory M. Sleet

UNITED STATES DISTRICT JUDGE

----- Footnotes -----

n2 The parties disagree as to whether this is a directly related matter.

----- End Footnotes -----

III. CONCLUSION.

EXHIBIT J

Toro - Groundsmaster® 3505-D



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Professional Contractor

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Irrigation Solutions



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Select One **Model:** Groundsmaster® 3505-D

Select: Groundsmaster® 3505-D Sports Turf Mowers

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- Select One -

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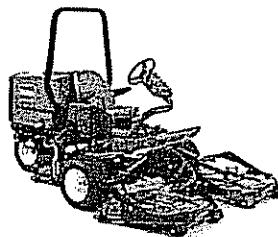
Specifications and design subject to change without notice.

Overview

Engine	Kubota® 35 hp
Fuel Capacity	11 gallons
Ground Speed	Forward 0-6 mph
Steering	Hydraulic power steering
Approximate Weight	2,100 lbs.
Warranty	2 year limited warranty

SPECIFICATIONS

- > Overview
- > View All Specs (PDF)



CUSTOMER CARE

- Toro Professional Services
- Where to Buy and Service Your Toro
- Grounds and Sports Turf Customer Care
- Look Up Parts
- Request Operator's and Parts Manuals
- Frequently Asked Questions

RELATED LINKS

- Demo Request
- [ToroSports.com](#)

EXHIBIT K

U.S. DISTRICT COURT - JUDICIAL CASELOAD PROFILE

		12-MONTH PERIOD ENDING SEPTEMBER 30							
MINNESOTA		2004	2003	2002	2001	2000	1999	Numerical Standing	
OVERALL CASELOAD STATISTICS	Filings*	6,163	7,190	4,718	2,730	3,216	2,431	U.S.	Circuit
	Terminations	4,790	4,021	2,876	2,754	3,357	2,766		
	Pending	8,605	7,202	4,031	2,195	2,213	2,349		
	% Change in Total Filings	Over Last Year		-14.3				90	10
		Over Earlier Years		30.6	125.8	91.6	153.5	2	1
	Number of Judgeships	7	7	7	7	7	7		
ACTIONS PER JUDGESHIP	Vacant Judgeship Months**	.0	.0	4.1	.0	.0	4.1		
	FILINGS	Total	880	1,028	674	390	459	347	2
		Civil	800	962	614	344	411	305	2
		Criminal Felony	62	54	47	46	48	42	56
		Supervised Release Hearings**	18	12	13	-	-	46	7
	Pending Cases		1,229	1,029	576	314	316	336	4
	Weighted Filings**		679	632	597	478	495	461	4
	Terminations		684	574	411	393	480	395	5
	Trials Completed		16	12	14	12	13	14	63
	MEDIAN TIMES (months)	From Filing to Disposition	Criminal Felony	8.9	7.9	8.4	7.5	7.5	8.0
			Civil**	6.6	6.5	7.1	8.9	12.6	10.0
		From Filing to Trial** (Civil Only)		22.0	24.5	26.0	20.7	20.8	22.0
OTHER	Civil Cases Over 3 Years Old**	Number	75	27	50	53	57	27	
		Percentage	.9	.4	1.3	2.7	2.8	1.3	8
	Average Number of Felony Defendants Filed Per Case		1.5	1.4	1.6	1.5	1.6	1.7	
	Jurors	Avg. Present for Jury Selection	46.47	47.85	39.62	35.94	39.08	35.83	
		Percent Not Selected or Challenged	28.3	40.6	31.1	35.3	35.7	33.0	

2004 CIVIL AND CRIMINAL FELONY FILINGS BY NATURE OF SUIT AND OFFENSE

Type of	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	5603	92	13	359	32	18	398	329	3549	196	480	16	121
Criminal*	431	15	11	62	7	4	171	**	6	77	14	28	36

* Filings in the "Overall Caseload Statistics" section include criminal transfers, while filings "By Nature of Offense" do not.
 ** See "Explanation of Selected Terms."

EXHIBIT L

U.S. DISTRICT COURT - JUDICIAL CASELOAD PROFILE

		12-MONTH PERIOD ENDING SEPTEMBER 30							
DELAWARE		2004	2003	2002	2001	2000	1999	Numerical Standing	
OVERALL CASELOAD STATISTICS	Filings*	1,797	1,362	2,028	1,004	1,303	1,033	U.S.	Circuit
	Terminations	1,516	1,507	1,478	1,020	955	861		
	Pending	2,085	1,836	1,999	1,477	1,502	1,154		
	% Change in Total Filings	Over Last Year		31.9				5	2
		Over Earlier Years		-11.4	79.0	37.9	74.0	4	2
Number of Judgeships		4	4	4	4	4	4		
Vacant Judgeship Months**		.0	1.9	3.1	.0	.0	.0		
ACTIONS PER JUDGESHIP	FILINGS	Total	449	340	507	251	326	258	52
		Civil	414	306	462	233	307	240	29
		Criminal Felony	29	25	38	18	19	18	91
		Supervised Release Hearings**	6	9	7	-	-	-	90
	Pending Cases		521	459	500	369	376	289	20
	Weighted Filings**		534	424	516	379	389	320	31
	Terminations		379	377	370	255	239	215	64
	Trials Completed		19	23	18	16	19	13	47
MEDIAN TIMES (months)	From Filing to Disposition	Criminal Felony	9.1	8.3	9.8	8.0	6.6	6.0	68
		Civil**	14.0	11.2	8.2	12.6	10.9	11.5	93
	From Filing to Trial** (Civil Only)		26.0	24.0	22.5	21.0	24.0	19.7	58
OTHER	Civil Cases Over 3 Years Old**	Number	65	66	99	77	70	38	
		Percentage	3.4	3.9	5.4	5.5	4.9	3.5	43
	Average Number of Felony Defendants Filed Per Case		1.2	1.3	1.1	1.3	1.2	1.3	
	Jurors	Avg. Present for Jury Selection	38.50	34.98	33.84	32.68	35.75	30.23	
		Percent Not Selected or Challenged	20.9	24.0	24.4	19.9	28.5	15.1	

2004 CIVIL AND CRIMINAL FELONY FILINGS BY NATURE OF SUIT AND OFFENSE

Type of	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	1655	20	1	238	10	5	28	72	56	198	135	2	890
Criminal*	115	9	5	40	-	4	24	**	2	19	-	6	6

* Filings in the "Overall Caseload Statistics" section include criminal transfers, while filings "By Nature of Offense" do not

** See "Explanation of Selected Terms."

EXHIBIT M

2003 U.S. Dist. LEXIS 18320

AT HOME CORPORATION, Plaintiff, v. COX COMMUNICATIONS, INC., COX@HOME INC., COMCAST CORPORATION, COMCAST ONLINE COMMUNICATIONS, INC., COMCAST PC INVESTMENTS INC., BRIAN L. ROBERTS and DAVID M. WOODROW, Defendants.

Civil Action No. 02-1486-JJF

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

2003 U.S. Dist. LEXIS 18320

October 8, 2003, Decided

DISPOSITION-1: [*1] Comcast Defendants' Motion for Improper and Inconvenient Venue and Cox Defendants' Motion To Transfer Pursuant To 28 U.S.C. § 1404 were granted.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff corporation contended that defendants, group one defendants and group two defendants, committed securities violations and breaches of fiduciary duty. The group one defendants moved to dismiss or transfer the action for improper and inconvenient venue. The group two defendants moved to dismiss or transfer for improper venue, or in the alternative, to transfer pursuant to 28 U.S.C.S. § 1404.

OVERVIEW: As to the motion filed by the group one defendants, a corporation one, two, and three and an individual, the corporation one and the corporation two were not residents of Delaware. The individual was not a resident of Delaware and did not transact business in Delaware. While the corporation three was organized under Delaware law, it was not qualified to do business in Delaware, and its slight connection to Delaware was overwhelmed by the lack of connection of the other three group one defendants. The court found that plaintiff had not shown that any acts or transactions involved in the case occurred in Delaware. Further, none of plaintiff's factual allegations demonstrated a connection to Delaware. With regard to the public interest factors, plaintiff was engaging in forum shopping and attempting to force the case into the district. Additionally, the local interest of New York, where the transactions that formed the basis of the claims asserted, was stronger than the local interest of Delaware in resolving the dispute. The court found that the convenience of the parties and witnesses was best be served by transferring the action to the district where proper venue existed.

OUTCOME: The group one defendants' motion for improper and inconvenient venue and the group two defendants' motion to transfer were granted. The case was transferred.

CORE TERMS: venue, motion to transfer, convenient, motion to dismiss, reasons discussed, collectively, convenience, weigh, securities law, local interest, transferring, transferred, resident, shopping

COUNSEL: Edmond D. Johnson, Esquire and Michael L. Vild, Esquire of THE BAYARD FIRM, Wilmington, Delaware.

Of Counsel: Joseph S. Allerhand, Esquire, Richard W. Slack, Esquire, and Daniel S. Cahill, Esquire of WEIL, GOTSHAL & MANGES LLP, New York, New York.

Counsel for Plaintiff At Home Corporation

Donald E. Reid, Esquire of MORRIS, NICHOLS, ARSHT & TUNNELL, Wilmington, Delaware.

Of Counsel: Michael D. Hays, Esquire, Michael D. Rothberg, Esquire, and Daniel D. Prichard, Esquire of DOW, LOHNES & ALBERTSON, PLLC, Washington, District of Columbia.

Counsel for Defendants Cox Communications, Inc., Cox@Home, Inc., and David M. Woodrow

Barry M. Klayman, Esquire of WOLF, BLOCK, SCHORR AND SOLIS-COHEN, LLP, Wilmington, Delaware.

Of Counsel: Michael S. Shuster, Esquire and Sheron Korpus, Esquire of WHITE & CASE LLP, New York, New York.

Counsel for Defendants Comcast Corporation, Comcast Online Communications, Inc., Comcast PC Investments Inc., and Brian L. Roberts.

JUDGES: Farnan, District Judge.

OPINIONBY: Farnan

OPINION: [*2]

2003 U.S. Dist. LEXIS 18320

MEMORANDUM OPINION

Wilmington, Delaware

Farnan, District Judge.

Presently before the Court is the Motion To Dismiss (D.I. 21-1) Or Transfer This Action For Improper And Inconvenient Venue (D.I. 21-2) filed by Comcast Corporation, Comcast Online Communications, Inc., Comcast PC Investments Inc., and Brian L. Roberts (collectively "Comcast Defendants") and the Motion to Dismiss (D.I. 15-1) or Transfer For Improper Venue (D.I. 15-2), or In The Alternative, To Transfer Pursuant To 28 U.S.C. § 1404 (D.I. 15-3) filed by Cox Communications, Inc., Cox@Home, Inc., And David M. Woodrow (collectively "Cox Defendants"). For the reasons discussed, the Court will grant the Comcast Defendants' Motion for Improper and Inconvenient Venue (21-2) and the Cox Defendants' Motion To Transfer Pursuant To 28 U.S.C. § 1404 (D.I. 15-3)

BACKGROUND AND ALLEGATIONS OF THE PARTIES

In this action, At Home Corporation ("At Home") contends defendants Comcast Corporation ("Comcast"), Comcast Online Communications, Inc. ("Comcast Online"), Comcast PC Investments Inc. ("Comcast PC"), and Brian L. Roberts and Defendants Cox Communications, [*3] Inc. ("Cox"), Cox@Home, and David M. Woodrow ("Woodrow") have committed securities violations and breaches of fiduciary duty.

The Comcast Defendants assert that the lack of any connection with Delaware makes a transfer of the action to the Southern District of New York appropriate. The Comcast Defendants contend that the Southern District of New York is an easier and more convenient venue. The Comcast Defendants allege essentially the same arguments in support of their motion to dismiss the case for lack of jurisdiction and improper venue.

By their motion to transfer or dismiss, the Comcast Defendants contend that neither they nor this action have sufficient connections to Delaware to make venue proper here. They assert that Comcast, Comcast Online, and Mr. Roberts have no presence in Delaware. The Comcast Defendants assert that the transactions at issue in At Home's securities law claim did not occur in Delaware and that the Court's subject matter jurisdiction over the claim of breach of fiduciary duty is dependent on jurisdiction over the securities law claim. Consequently, the Comcast Defendants assert, both claims must be dismissed or transferred.

The Cox Defendants also support [*4] transferring this case. The Cox Defendants assert because Comcast is an indispensable party to the instant case and venue is improper as to Comcast, venue is improper as to Cox. Cox claims that the transactions creating the claims At Home asserts are not related to Delaware, and that New York is a more convenient venue for the instant case.

At Home responds that venue is proper in Delaware, and that Delaware is a more convenient venue than New York because the action has significant connections to Delaware.

DISCUSSION

The Court will first consider the Motions to Transfer filed by the Comcast and Cox Defendants. 28 U.S.C. § 1404(a) states that "for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

In the Third Circuit, decisions on motions to transfer are guided by the private and public factors announced in Jumara v. State Farm Ins. Co. 55 F.3d 873, 879 (3rd Cir. 1995). When determining whether or not transfer is warranted in the circumstances presented, district courts must balance all of the relevant [*5] factors and respect that a plaintiff's choice of forum is entitled to substantial deference and should not be lightly disturbed when it is due to legitimate, rational concerns. Id. at 883. The burden is upon the movant to establish that the balance of the interests strongly weighs in favor of transfer, and a transfer will be denied if the factors are evenly balanced or weigh only slightly in favor of the transfer. See Continental Cas. Co. v. American Home Assurance Co., 61 F. Supp.2d 128, 131 (D.Del. 1999).

PRIVATE CONSIDERATIONS

The Court finds that the Comcast Defendants do not have a significant relation to Delaware. Comcast and Comcast Online are not residents of Delaware. Comcast is incorporated, and has its principal place of business, in Pennsylvania. Comcast Online has merged with Comcast and is not a distinct entity. Mr. Roberts is not a resident of Delaware and does not transact business in Delaware. While Comcast PC is organized under Delaware law, it is not qualified to do business in Delaware, and its slight connection to Delaware is overwhelmed by the lack of connection of the other three Comcast Defendants.

The Court also finds [*6] that At Home has not shown that any acts or transactions involved in this case occurred in Delaware. Further, the Court finds that

2003 U.S. Dist. LEXIS 18320

none of At Home's factual allegations demonstrate a connection to Delaware.

PUBLIC CONSIDERATIONS

With regard to the public interest factors, the Court finds that At Home is engaging in forum shopping and attempting to force this case into the District of Delaware. Obviously, when a Court finds or it appears based on the circumstances that a party is making an effort at forum shopping, transfer is warranted. Additionally, the Court finds that the local interest of New York, where the transactions that form the basis of the claims asserted is stronger than the local interest of Delaware in resolving this dispute.

After considering the relevant factors for transfer of this case, the Court finds, balancing the relevant private and public factors, that the convenience of the parties and witnesses will best be served by transferring this action to the Southern District of New York where proper venue exists. Accordingly, the Motion to Transfer under 1404(a) will be granted and the case will be transferred to the Southern District of New York.

CONCLUSION [*7]

For the reasons discussed, the Court will grant the Comcast Defendants' Motion for Improper and Inconvenient Venue and the Cox Defendants' Motion To Transfer Pursuant To 28 U.S.C. § 1404. An Order consistent with this Memorandum Opinion has been entered.

EXHIBIT N

2003 U.S. Dist. LEXIS 988

THE ORIGINAL CREATINE PATENT COMPANY, LTD, Plaintiff, v KAIZEN, INC , Defendant.

Civil Action No 02-471-SLR

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

2003 U.S. Dist. LEXIS 988

January 22, 2003, Decided

DISPOSITION-1: [*1] Defendant's motion to dismiss or, in the alternative, to transfer was granted.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff patentee filed an amended complaint for patent infringement against defendant corporation. The corporation filed an answer and asserted affirmative defenses, including inequitable conduct and bad faith and then moved to dismiss or to transfer. The patentee responded with a motion to strike and/or dismiss 15 of the corporation's affirmative defenses.

OVERVIEW: The court found the balance of private factors weighed in favor of transfer. The record reflected that neither litigant had ties to Delaware. Geographically, Delaware was inconvenient to everyone. All witnesses, documents and employees were located outside of the instant forum. Although the corporation described itself as a world-wide operation, there was nothing presented to corroborate this apparent embellishment. Turning to the public interests, the court found the practical considerations related to trial weighed in favor a transfer. The expense of trial in Delaware weighed more heavily on the corporation. Regardless of the forum, the patentee would incur travel expenses. A transfer to California would have eliminated rather than merely shifting the travel expense of one party. The court was likewise confident that the district court in California was well-equipped to decide the issues implicated, regardless of the pendency of the patentee's other infringement actions before the instant court. Further, considering the corporation was a California corporation conducting business therein, that forum had a more particular interest in the litigation than Delaware.

OUTCOME: The corporation's motion to dismiss or, in the alternative, to transfer was granted and the action was transferred.

CORE TERMS: patent, convenience, weigh, choice of forum, patents-in-suit, website, fora, motion to dismiss, creatine-containing, world-wide, reside, balance of convenience, deference, patent infringement, motion to strike, third party, store owner,

declaration, implicated, embodying, nutrition, invention, internet, inventors, travel

COUNSEL: For ORIGINAL CREATINE PATENT COMPANY, LTD, plaintiff: Richard L Horwitz, Potter Anderson & Corroon, LLP, Wilmington, DE

For KAIZEN INC , defendant: David L Finger, David L Finger, Esq., Wilmington, DE

JUDGES: Sue L. Robinson, United States District Judge

OPINIONBY: Sue L. Robinson

OPINION: MEMORANDUM ORDER

At Wilmington this 22nd day of January, 2003, having reviewed defendant's motion to dismiss or, in the alternative, to transfer and the papers submitted in connection therewith;

IT IS ORDERED that said motion to transfer (D.I. 14) is granted, for the reasons that follow: n1

-----Footnotes-----

n1 Because the court is transferring the action to California, Kaizen's motion to dismiss for lack of personal jurisdiction is denied as moot. Kaizen's motions for protective orders (D.I. 25, 31) and OCPC's motion to strike (D.I. 10) are denied without prejudice to renew.

-----End Footnotes-----

1. **Introduction.** On July 11, 2002, plaintiff, The Original Creatine Patent [*2] Co., Ltd. ("OCPC"), filed an amended complaint for patent infringement against defendant Kaizen, Inc. ("Kaizen"). n2 (D.I. 7) The patents-in-suit are United States Patent Number 5,757,159 ("the '159 patent") and United States Patent Number 5,968,544 ("the '544 patent"). OCPC alleges that Kaizen has made, used, offered for sale, and continues to do the same, creatine-containing products

2003 U.S. Dist. LEXIS 988

embodying the invention patented in the '544 patent OCPC further contends that Kaizen has marketed and sold creatine-containing products embodying the invention in the '159 patent. Kaizen filed an answer and asserted affirmative defenses, including inequitable conduct and bad faith (D.I. 9) Kaizen then filed this motion to dismiss or transfer to the Central District of California. (D.I. 10) OCPC responded with a motion to strike and/or dismiss fifteen of Kaizen's affirmative defenses. (D.I. 10)

----- Footnotes -----

n2 CPC filed the original complaint incorrectly against Kaizen, Inc., a Delaware corporation unrelated to this action (D.I. 1, 15)

----- End Footnotes -----

[*3]

2. **Background.** OCPC is an English corporation with its principal place of business in Leeds, United Kingdom (D.I. 7, P2) OCPC is the assignee of the two patents-in-suit, the '159 patent, issued to inventors Eric Hultman and Roger C. Harris, and the '544 patent, issued to inventors Alan N. Howard and Roger C. Harris. (Id. at PP5-6) While Hultman resides in Sweden, Howard and Harris reside in the United Kingdom. (D.I. 19, Ex. 1) The attorneys who prosecuted the patents are located in Washington, D.C. and Chicago, Illinois. OCPC has filed four other actions to enforce the patents-in-suit against different defendants, all of which are pending before this court.

3. Kaizen is a California corporation with only one office located in Los Angeles, California. (D.I. 15, Ex. A) Kaizen is a corporation involved in the advertising, distribution and sales of health food products. (Id. at P2) In 1998, Kaizen entered a licensing agreement to market, distribute and sell creatine-containing products from a German company under the trade-name Creapure <TM>. (Id. at P4) Kaizen claims that all its documents, and employees are located in California. With the exception of two potential [*4] witnesses, n3 Kaizen indicates the remaining reside in California.

----- Footnotes -----

n3 There are two witnesses located in Georgia and Canada. (D.I. 15 P 9)

----- End Footnotes -----

4. **Standard of Review.** Under 28 U.S.C. § 1404(a), a district court may transfer any civil action to any other district where the action might have been brought for the convenience of parties and witnesses and in the interest of justice. Congress intended through § 1404 to place discretion in the district court to adjudicate motions to transfer according to an individualized, case-by-case consideration of convenience and the interests of justice. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29, 101 L. Ed. 2d 22, 108 S. Ct. 2239 (1988); Affymetrix, Inc. v. Synteni, Inc., 28 F. Supp.2d 192, 208 (D. Del. 1998).

The burden of establishing the need to transfer rests with the movant "to establish that the balance of convenience of the parties and witnesses strongly favors the defendants." Bergman v. Brainin, 512 F. Supp. 972, 973 (D. Del. 1981) [*5] (citing Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970), "Unless the balance is strongly in favor of a transfer, the plaintiff's choice of forum should prevail". ADE Corp. v. KLA-Tencor Corp., 138 F. Supp.2d 565, 567 (D. Del. 2001); Shutte, 431 F.2d at 25.

The deference afforded plaintiff's choice of forum will apply as long as a plaintiff has selected the forum for some legitimate reason C.R. Bard, Inc. v. Guidant Corp., 997 F. Supp. 556, 562 (D. Del. 1998); Siemens Medical Systems, Inc. v. Fonar Corporation, C.A. No 95-261-SLR, 1995 U.S. Dist. LEXIS 22334, slip op. at 8 (D. Del. Nov. 1, 1995); Cypress Semiconductor Corp. v. Integrated Circuit Systems, Inc., 2001 U.S. Dist. LEXIS 20803, 2001 WL 1617186 (D. Del. Nov. 28, 2001). Although transfer of an action is usually considered as less convenient to a plaintiff if the plaintiff has not chosen its "home turf" or a forum where the alleged wrongful activity occurred, the plaintiff's choice of forum is still of paramount consideration, and the burden remains at all times on the defendants to show that the balance of convenience and the interests of justice weigh strongly in favor of transfer. [*6] " In re M.L.-Lee Acquisition Fund II, L.P., 816 F. Supp. 973, 976 (D. Del. 1993).

The Third Circuit Court of Appeals has indicated the analysis for transfer is very broad. Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995). Although emphasizing that "there is no definitive formula or list of factors to consider," id., the Court has identified potential factors it characterized as either private or public interests. The private interests include: "(1) plaintiff's forum preference as manifested in the original choice; (2) defendant's preference; (3) whether the claim arose elsewhere; (4) the convenience of the parties as indicated by their relative physical and financial condition; (5) the convenience of the witnesses but only to the extent that the witnesses may

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actually be unavailable for trial in one of the fora; and (6) location of books and records (similarly limited to the extent that the files could not be produced in the alternative forum)." Id. (citations omitted).

The public interests include: "(1) the enforceability of the judgment; (2) practical considerations that could make the trial easy, expeditious or inexpensive; [*7] (3) the relative administrative difficulty in the two fora resulting from court congestion; (4) the local interest in deciding local controversies at home; (5) the public policies of the fora; and (6) the familiarity of the trial judge with the applicable state law in diversity cases." Id. (citations omitted).

5 Discussion. Kaizen argues the public and private interests weigh in favor of a transfer to the Central District of California. Specifically, Kaizen argues that OCPC has no parties, witnesses or evidence related to this action in Delaware. Kaizen avers that OCPC instituted this action in Delaware for the sole reason of accommodating the convenience of its lawyers, who practice in this state. Kaizen contends that the action actually emanates from Los Angeles, California, the location of its sales center. California is also the location of all events and evidence related to the litigation. (D.I. 15, Ex. A)

6. OCPC contends its choice of forum should be afforded deference (D.I. 19) The Delaware forum was selected because Kaizen has committed patent infringement in this state, argues OCPC. Moreover, the evidence and witnesses necessary to defend against Kaizen's affirmative [*8] defenses are located in Sweden, the United Kingdom, Washington, D.C. and Illinois. Although all of these witnesses will have to travel for trial purposes, OCPC asserts that Delaware is a closer forum than California. Further, because there are three other cases involving the same patents pending before this court, judicial economy will be promoted by maintaining this action. (D.I. 19, Ex. 1) The risk of inconsistent results will be reduced by allowing one judge to become proficient in the patent technology and the relevant facts.

OCPC also raises another issue related to Kaizen's business, or lack thereof, in Delaware. On Kaizen's internet website, the company describes itself as maintaining offices "world-wide," in addition to the California office. (D.I. 19, Ex. 2) The Kaizen website does not accept orders for its products. However, the website does provide a link to an internet nutrition store which sells Kaizen products. According to the declaration of an OCPC attorney, she was able to place post-complaint orders for Kaizen products, including those alleged to infringe the patents-in-suit, from the linked nutrition store. (D.I. 19, Ex. 3) The orders were made from a Delaware computer [*9] and she

received the products in Delaware. The attorney states that she was able to buy a nationally distributed magazine at a Delaware bookstore that contained advertisements for Kaizen products. She was also able to purchase, in person, noninfringing Kaizen products from a Delaware store. She states that the owner of the store told her that he has received solicitations to sell the entire line of Kaizen products. OCPC plans to call the Delaware store owner as a third party witness.

In response, Kaizen urges the court to strike the declaration as it contains impermissible double hearsay. (D.I. 20) However, even if it were considered, Kaizen contends it does not establish that Kaizen conducts business in Delaware or sells the accused products here. Moreover, the fact that Kaizen's website describes its operations as "world-wide" still does not establish any business relationship with anyone in Delaware. Kaizen also argues that any problems with having third party witness testifying in California, can be solved by taking the depositions elsewhere.

Since the parties do not dispute that this action could have been initiated in the Central District of California, an examination of the [*10] private issues implicated by a transfer is warranted. The court finds the balance of private factors weighs in favor of transfer. The record reflects that neither litigant has ties to Delaware. Geographically, Delaware is inconvenient to everyone. All witnesses, documents and employees are located outside of this forum. Although Kaizen may describe itself as a world-wide operation, there has been nothing presented to corroborate this apparent embellishment.

With regard to compulsory process problems, OCPC indicates that a Delaware store owner will be called as a trial witness. However, it has not established that this individual will be unwilling to testify outside of Delaware. Absent a demonstrable obstacle to obtaining personal jurisdiction over a third-party witness, the court declines to consider this as a problem.

Turning to the public interests, the court finds the practical considerations related to trial weigh in favor a transfer. As noted, the expense of trial in Delaware will weigh more heavily on Kaizen. Regardless of the forum, OCPC will incur travel expenses. A transfer to California would eliminate rather than merely shifting the travel expense of one party. See [*11] Van Dusen v. Barrack, 376 U.S. 612, 646, 11 L. Ed. 2d 945, 84 S. Ct. 805 (1964).

The court is likewise confident that the Central District of California is well-equipped to decide the issues implicated by this case, regardless of the pendency of OCPC's other infringement actions. Further, considering Kaizen is a California corporation conducting business therein, that forum has a more

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particular interest in the litigation than Delaware.
Accordingly, for the reasons stated, this action is
transferred to the Central District of California.

Sue L. Robinson

United States District Judge